Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-928**

UNITED STATES OF AMERICA,

*Petitioner*

*—v.—*

NATHAN GEORGE DINITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 27, 1975
CERTIORARI GRANTED MARCH 31, 1975

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## INDEX


| | Page |
|---|---|
| Chronological list of relevant docket entries | 1 |
| Indictment of December 6, 1972 | 3 |
| Relevant portions of transcript of trial of February 14-16, 1973 | 5 |
| Order Granting certiorari | 45 |

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 6, 1972. Indictment filed.

December 7, 1972. Arrest Warrant Issued.

December 8, 1972. Defendant Arrested.

December 14, 1972. Arrest Warrant Return filed.

January 4, 1973. Defendant Arraigned; Pleads Not Guilty; Bond Raised to $15,000 Cash or Surety

January 22, 1973. Bond Reduced by Fifth Circuit Court of Appeals

January 26, 1973. Defendant's Motion to Inspect and Copy Grand Jury Minutes and To Extend Time Within Which to Move to Dismiss.

January 26, 1973. Defendant's Motion for Production of Evidence.

January 26, 1973. Defendant's Motion to Suppress Evidence

January 26, 1973. Defendant's Motion to Inspect and Copy Grand Jury Minutes and for Production of Evidence Denied.

February 9, 1973. Defendant's Motion for Leave to File Notice of Appeal on Court's Order Denying Motion to Inspect and Copy Grand Jury Minutes.

February 9, 1973. Defendant's Motion for Random Jury Selection Denied.

February 9, 1973. Defendant's Motion for Production of FBI and Other Records Denied

February 12, 1973. Defendant's Motion for Leave to File Notice of Appeal on Court's Order Denying Motion to Inspect and Copy Grand Jury Minutes Denied.

February 14, 1973. Jury Trial Commences

February 15, 1973. Defendants Motions to Suppress Evidence and for Evidentiary Hearing.

February 15, 1973. Defendant's Motion for Codefendant's Local Arrest Record Denied.

February 16, 1973. Defendant's Motion for Mistrial Granted

February 21, 1973. Motion of Jeffrey Meldon for Leave to Withdraw As Counsel for Defendant.

February 26, 1973. Motion of Jeffrey Meldon for Leave to Withdraw Granted.

February 26, 1973. Defendant's Motions for Reinstatement of Attorney Maurice Wagner and to Dismiss.

March 26, 1973. Defendant's Motions for Reinstatement and to Dismiss Denied.

April 16, 1973. Jury Trial

April 17, 1973. Defendant Found Guilty.

May 15, 1973. Defendant Sentenced.

May 15, 1973. Notice of Appeal Filed.

April 4, 1974. Panel Decision of Court of Appeals Filed Reversing Conviction.

November 27, 1974. Opinion of Court of Appeals *En Banc* Affirming Panel Decision Filed.

January 27, 1975. Petition for Writ of Certiorari filed.

March 31, 1975. Petition for Writ of Certiorari Granted.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Gainesville Criminal Number: 1365

[Filed in open court this Dec. 6, 1972. Clerk, U.S. District Court, North. Dist. Fla.]

THE UNITED STATES OF AMERICA

*vs.*

EDWARD HORACE REESE AKA "RAY"
AND NATHAN GEORGE DINITZ

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

FROM on or about October 23, 1972, and continuously thereafter up to and including the date of this Indictment, in the Northern District of Florida, and elsewhere, the defendants: EDWARD HORACE REESE aka "RAY" and NATHAN GEORGE DINITZ did knowingly and intentionally combine, conspire, confederate and agree and have a tacit understanding with each other and with diverse other persons whose names are to the Grand Jury unknown to comit offenses against the United States of America, to wit: to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In furtherance of this conspiracy the defendants did commit the following overt acts:

OVERT ACTS

1. At all times material hereto, defendants EDWARD HORACE REESE aka "RAY" and NATHAN GEORGE

DINITZ lived together at the same residence in Gainesville, Florida.

2. On or about October 24, 1972, at the residence of these defendants, EDWARD HORACE REESE aka "RAY" sold approximately 20 tablets of Lysergic Acid Diethylamide, otherwise known as "LSD".

3. On or about October 25, 1972, at the said residence of these defendants, NATHAN GEORGE DINITZ sold approximately 48 tablets of Lysergic Acid Diethylamide, otherwise known as "LSD".

COUNT II

THE GRAND JURY CHARGES:

ON or about OCTOBER 24, 1972, in the Northern District of Florida, EDWARD HORACE RESSE, aka "RAY" knowingly and intentionally did distribute approximately TWENTY TABLETS OF LYSERGIC ACID DIETHYLAMIDE, OTHERWISE KNOWN AS "LSD", a Schedule I, CONTROLLED SUBSTANCE, in violation of Title 21 United States Code, Section 841(a)(1).

COUNT III

THE GRAND JURY CHARGES:

ON or about October 25, 1972, in the Northern District of Florida, NATHAN GEORGE DINITZ knowingly and intentionally did distribute approximately FORTY EIGHT (48) TABLETS OF LYSERGIC ACID DIETHYLAMIDE, OTHERWISE KNOWN AS "LSD", a Schedule I CONTROLLED SUBSTANCE, in violation of Title 21 United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ John M. Cherry, Jr.
Foreman

/s/ Robert L. Crongeyer, Jr.
ROBERT L. CRONGEYER, JR.
Assistant United States Attorney



[44]

RELEVANT PORTION OF TRANSCRIPT OF TRIAL OF FEBRUARY 14-16, 1973

* * * *

MR. CRONGEYER: Judge, I have one further thing. I would clarify this for the record. Is Mr. Baldwin appearing as counsel of record, co-counsel of record for the Defendant in this case?

THE COURT: He said he has not asked to appear.

MR. CRONGEYER: We would ask that, Your Honor, we would object to his appearance sitting at the defense counsel table unless [45] he is appearing as counsel of record.

THE COURT: What is his—

MR. WAGNER: He is counsel. He is an attorney. He is counsel of record. He is a professor at the university, but we have been instructed not to make mention of that fact by the Court and that, of course, we will not.

We will call him Mr. Baldwin or Attorney Baldwin just as the Court has instructed us. He will make the arguments with regard to the law and I will try the facts and that is about it, Judge.

He will examine the witnesses. We filed a certificate as instructed by the Court as to his competency.

THE COURT: What basis do I have, Mr. Crongeyer, from preventing this man from appearing?

MR. CRONGEYER: Nothing, Your Honor. I just wanted to clarify his status or his position.

MR. WAGNER: Okay.

MISS HOTAL: Can I go?

THE COURT: [46] Yes, ma'am.

MR. MELDON: Thank you very much.

THE COURT: Bring the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Ladies and gentlemen of the Jury, it is going to be necessary that we take a recess in this case while the Court takes care of some legal matters out-

side the presence of the Jury. The Jury will be excused until 2:15 P.M. and I will ask you to leave the Courtroom and do not come back into the Courtroom until you are called.

The Marshal will show you where to report when you return. During this recess you are not to discuss this case with anyone, among yourselves or with anyone else. You are not to allow anyone to discuss this case in your presence or hearing.

You are also instructed not to arrive at any decision in this case until it has been finally submitted to you.

The Jury will be excused now, Mr. Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

[47] THE COURT: We will now proceed with the hearing on the motion to suppress.

The Government may proceed.

MR. REED: Your Honor, not wishing to be obstructive of this, but it is my understanding of the law that in a suppression hearing the defense or the movant bears the burden to show that the evidence should be suppressed.

MR. WAGNER: We will concede that is the case.

THE COURT: Proceed, Mr. Wagner.

MR. WAGNER: Thank you, sir. We will call Mr. Cox as a witness, and, if Your Honor please, it would appear that this might be a good time to invoke the Rule and to swear the witness and get them out of the room. They are about to hear testimony which might be affected, although I don't think it will. Perhaps it might.

THE COURT: Any other witnesses, Mr. Reed?

MR. REED: Yes, sir, Your Honor, we have witnesses we will gladly exclude, but again, I wonder about the [48] technicality so to speak of having a suppression hearing. I don't think they need to be sworn.

THE COURT: I will ask the witnesses to leave anyhow. All witnesses in this case will leave the Courtroom until you are called.

(Whereupon, the Rule was invoked.)

THE COURT: You can take the stand, Mr. Cox.

Whereupon,



STEVE JUNA COX

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WAGNER:

Q Please state your name?
A Steve Juna Cox.
Q Where do you live?
A Alachua County, Florida.
Q How old are you?
A 27.
Q What is your occupation at the present time?
A I am an Enforcement Agent with District II, Gainesville, Florida.

[49] Q Was this your occupation on October 20 or thereabouts, between October 20 and the present date, 1972?

A Yes, sir, it was.
Q Were you still serving in that capacity?
A I am a Street Supervisor with the same outfit at this time.
Q Mr. Cox, it was you who initiated the arrest of the Defendant in this case, Nathan Dinitz?
A I was the case agent, yes, sir.
Q And you were the agent that made the investigation that resulted in his arrest?
A That is correct, yes, sir.
Q And it is based upon your testimony that the arrest was in fact made?
A That is correct.
Q All right, now, were there any other witnesses to the incident which formulates the basis for these charges against Nathan Dinitz other than yourself?

MR. CRONGEYER: Your Honor, I don't see the relevancy of this as to the suppression issue, what other witnesses were there at the time. We are dealing spe-

cifically with the suppression issue here in this hearing.

THE COURT: What was the question?

[50] (Whereupon, the Court Reporter read the pending question, as requested.)

THE COURT: Objection overruled.

THE WITNESS: There was surveilling agents involved who were on surveillance during this time and as far as any other witnesses, the chemist and the person that handled the evidence.

MR. WAGNER: If Your Honor please, you will recall the Defendant has stipulated to the drug being a legitimate drug, and so forth, so the chemist isn't necessary as I understand it.

At this point, Judge, we have stipulated to that and we have also stipulated to the chain of evidence. That is not involved in this case any longer. I don't know if it is a matter of record, but I think I represented that to the Court the other day and that is still our position.

THE COURT: What point are you trying to make?

MR. WAGNER: I simply wanted the Court to know that when he mentioned the chemist, that is not significant.

THE COURT: [51] I think I could remember that.

BY MR. WAGNER:

Q All right, sir, thank you. Now, this incident occurred or started on October 23rd or rather October 22nd. 1972, is that correct, this particular incident for this case began on or about October 22, 1972?

A The 23rd of October was the first time I was aware of it, of the circumstances involved.

Q All right, sir, and which was a Monday?

A Yes, sir.

Q That was on Monday, October 23rd, that you met an unidentified white male who advised you that if you had contacted a man named Ray at 1806 Southwest Avenue in Gainesville you might be able to buy some mescaline, is that right?

A Two unidentified white males.



Q There were two unidentified white males?

A That is correct.

Q Was my statement accurate?

A Yes.

Q You were told you could probably buy some mescaline at that address from a man named Ray?

A That is correct.

Q All right, you proceeded there at about 2:30 that afternoon, met another unidentified white male and was [52] advised that Ray was not at home?

MR. REED: Your Honor, I object to the form of this question. He called this witness and—

THE COURT: Objection sustained.

BY MR. WAGNER:

Q Tell the Court, please, what transpired after you learned about the possibility of making this purchase? Where did you go?

A I proceeded on that afternoon to the address.

Q 1806 Northwest 2nd?

A Yes, sir.

Q In Gainesville?

A Yes, sir.

MR. REED: Your Honor, may we ask that the witness be allowed to answer the question?

THE COURT: Proceed.

THE WITNESS: I continued to 1806 Northwest 2nd Avenue and I met with the same two white males that I had met earlier that day who advised me to go to this address.

They were standing outside the residence and [53] one approached the car and advised that Ray wasn't in and I would have to come back later, he was working.

So I departed and from there I contacted Ray the next day at approximately 1:30 P.M. and introduced myself and he introduced hisself and advised—

Q Where did this meeting take place on October 24th?

A 1806 Northwest 2nd Avenue in Gainesville.

Q All right, go ahead.

A I introduced myself as Jerry and he introduced hisself as being Ray.

Q Anyone else there at this time besides you and Ray?
A Not at this time, no.
Q And this meeting took place where, please, specifically where?
A 1806 Northwest 2nd Avenue in Gainesville.
Q What room of that house if you can identify it for us?
A I was outside and he was standing inside.
Q You were on the porch?
A At this time I was outside.
Q All right, now, when you were speaking to him were you speaking through the door?
A Through the screen, right.
[54] Q Through the screen?
A Yes, sir.
Q Go ahead.
A I advised him that I was told to come to this address and talk to him in reference to some mescaline. I might be able to buy some mescaline and he asked me to come on in and I walked on in the living room and he asked me how many I wanted.
Q This conversation you related taking place in the living room, you had been invited inside, is that correct?
MR. REED: Your Honor,—
THE COURT: Yes, Mr. Reed.
MR. REED: The Government objects and respectfully asks to be heard briefly which may save time for the Court and everybody else. It appears that counsel is on a fishing expedition of sorts which may be fishing for what he may use later in the trial and there has been no allegation other than what is mentioned in their motion that there has ever been a search or seizure.
THE COURT: Objection sustained.
MR. WAGNER: [55] This information is necessary to lay a predicate, Your Honor, for the questions that will involve our client. This is the basis for our motion.
THE COURT: You get to the meat of the coconut first then I will let you come back to it to establish it.



BY MR. WAGNER:

Q All right, sir. In any event, you did make a buy from Ray on the 24th of 20 pills of mescaline?
MR. REED: The form of that question is leading. He is on direct. The witness is on direct.
MR. WAGNER: Counsel has suggested that I get to the point, Your Honor. That is the point.
THE COURT: Answer the question.
THE WITNESS: Yes, sir, I did.

BY MR. WAGNER:

Q Now, the man named Ray is not the Defendant in this case, is he?
A No, sir, he is not.
Q You have later learned his real name, is that correct?
[56] A Whose real name?
Q The man named Ray.
A Well, I think it is Edward Reese, but I am not positive.
Q He is a co-defendant in this case?
A That is correct.
Q All right, and you have charged him as Edward Horace Reese?
A That is correct.
Q Thank you. Nathan Dinitz was not there at the time this alleged buy was made, is that correct?
A The first meeting with Ray?
Q Yes.
A No, sir.
MR. REED: Your Honor,—
MR. GROSS: Your Honor, with the Court's permission I would like to join the Government's counsel at this particular time. Counsel now is discussing an event that occurred on a previous day. It is clear, Your Honor, that what—
THE COURT: The objection is sustained. Mr. Wagner, either get to the substance of this motion to suppress or we are going to call it off right now.

[57] MR. WAGNER: All right, sir. On the 25th you had an appointment to meet Ray that same evening to get a better price on mescaline?

MR. GROSS: Objection.

THE COURT: Objection sustained.

BY MR. WAGNER:

Q You returned to the house on the 25th of October for the same purpose as before, to meet Ray, is that correct?

MR. GROSS: Objection, Your Honor.

MR. WAGNER: This is the day and time and the place that is involved in our motion.

MR. GROSS: Your Honor, first of all, respectfully, there has not been an allegation or an affidavit to show that a search or seizure occurred. All that the papers seem to indicate is that this witness at best, and obviously the Government doesn't so admit, forced himself into the house.

Now, if he wants anything and I don't think he is entitled to anything in this hearing, but the Court has [58] already so decided, he ought to ask the witness just what his conversation was with Mr. Dinitz.

THE COURT: That is what we will do at this time or this hearing will go no further.

MR. WAGNER: I would like to make—

THE COURT: Get into the motion to suppress the evidence.

BY MR. WAGNER:

Q All right, sir. When you returned on October 25th, 1972, would you tell the Court, please, who you went to see?

MR. GROSS: Objection, Your Honor. Who he went to see is irrelevant. All that needs to be shown is whether or not he spoke with Mr. Dinitz.

THE COURT: Objection sustained.

MR. WAGNER: Your Honor, we have some law to support our position.



THE COURT: You have not established a predicate for this testimony as yet and until you do it is not coming into the [59] record.

MR. WAGNER: All right, sir.

THE COURT: You start asking this man now about the unlawful search. There is a motion to suppress and an allegation of an unlawful search and I want you to get to it now.

MR. WAGNER: If Your Honor please, this unlawful search is peculiar, that is to say, that the motion is not the ordinary and usual motion.

THE COURT: I understand. That is obvious from the motions.

MR. WAGNER: In any event, it is based upon facts which I believe Your Honor will be interested in knowing about and which is necessary.

THE COURT: If you do not abide by my orders to you I am going to have you removed from this Courtroom. You proceed into the unlawful search and seizure.

MR. WAGNER: Would Your Honor object to my making a proffer in the record of the evidence that I intend to elicit and then—

[60] THE COURT: Proceed.

MR. WAGNER: Out of the presence of this witness, Judge, so I will not, you know, taint his testimony in any way. Would you allow me to do that? I think under those circumstances Your Honor can make a ruling without any further ado and we could proceed.

MR. GROSS: We have no objection.

THE COURT: The witness may step out.

(Witness temporarily excused.)

MR. GROSS: Your Honor, first of all, is this affidavit filed by Mr. Meldon on information and belief, having spoken to his client, he files here under paragraph two, the Defendant Dinitz did not voluntarily waive his Fourth Amendment Rights to by consenting to Agent Cox's entry. If the Defendant's consent was obtained by means of trickery, stealth and strategy, there is no factual allegation to support the motion for a hearing here,

Your Honor. That is just a conclusive basis, but there is no factual allegations to support any hearing.

This hearing that counsel is trying to conduct [61] for the Defendant is just a fishing expedition so that they can hear this witness' testimony prior to having to cross examine him before the Jury.

THE COURT: That is not going to happen. Go ahead and make your proffer.

MR. WAGNER: All right. If Your Honor please, we believe we can elicit evidence from this witness to show that when he returned on the 25th, he returned by appointment with Ray and that is who he intended to see at 1806 Northwest 2nd Avenue and when he arrived there Ray was not there and he for the first time met the Defendant, Nat Dinitz, and it was during that meeting and by Mr. Cox's affirmative assertion that anything of an illegal nature occurred or allegedly occurred, what we will show, if Your Honor please.

THE COURT: Say that again. I didn't understand. It didn't make sense to me.

MR. WAGNER: I will say it in more precise terms. It is our position that when Mr. Cox returned he was looking for Ray. When Mr. Dinitz advised him that no Ray lived there, Mr. Cox said, well, he was supposed to give me a price, a better price on some mescaline, that it was Mr. Cox who broached this [62] entire matter with Ray, I mean with Mr. Dinitz, and having done so he was on a fishing expedition.

It would have been as though he had gone from room to room and solicited from everyone in that house.

THE COURT: Do you mean to say he then purchased or will testify that he purchased from this Defendant?

MR. WAGNER: Yes, sir.

THE COURT: And that is the grounds for your motion to suppress?

MR. WAGNER: That as a result of his suggestion and on a fishing expedition, he says he made a purchase from Nat Dinitz, and—



THE COURT: Your position is completely untenable and if that is all you have to offer this hearing is over.

MR. WAGNER: If Your Honor please, I—

THE COURT: Is there anything else, Mr. Wagner, that you plan to present here other than what you have proffered?

MR. WAGNER: [63] That is the evidence we intended to proffer.

THE COURT: The motion to suppress is denied.

MR. GROSS: Your Honor, may the Government also make a brief statement for the record?

THE COURT: Yes, sir.

MR. GROSS: That is, that Mr. Meldon's affidavit does not show any factual basis, either by having had Mr. Dinitz sign an affidavit or Mr. Meldon signing an affidavit based on information and belief, stating forth facts which would have brought the question to the point where a hearing might have been required.

Therefore, it wasn't entitled to a hearing to begin with. I have never seen, and the Government doesn't believe that counsel for the Defendant may put another witness, Government witness on the stand in the hope that during a fishing expedition he may be able to elicit testimony favorable to him.

He either has to put Mr. Dinitz on the stand to show basis for a hearing or at least file an affidavit on information and belief, and neither of these things were done and it is entirely too tardy to do them now.

[64] THE COURT: The motion to suppress should not have been heard by the Court because it was not timely filed. The proffer establishes absolutely no grounds for a motion or an order to suppress the evidence in this case and that motion will be denied.

We will continue with the trial of this case in approximately ten minutes. We will stand in recess until that time.

(Brief recess taken.)

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Be seated, please.

Is the Government ready to proceed?

MR. REED: Yes, sir, Your Honor.

THE COURT: Is the Defendant ready to proceed?

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: Call all of your witnesses, please, gentlemen.

MR. REED: Your Honor, the Government calls Steve Juna Cox [65] and Charles Clark and Robert Ginley.

THE COURT: Mr. Wagner?

MR. WAGNER: The Defendant calls—are you ready, Judge?

THE COURT: Yes, sir.

MR. WAGNER: Susan Josephson, the Defendant, Nathan Dinitz, Debora Dunbar and Geoffrey Mandley.

THE COURT: Mr. Wagner, I think probably all of those witnesses are outside. Are they in the Courtroom? Let's call them in the Courtroom and then you can call them forward. Would you call those names again, please, Mr. Wagner?

MR. WAGNER: Yes, sir. Susan Josephson, Nathan Dinitz.

THE COURT: Answer as your names are called, please.

MR. WAGNER: Debora Dunbar.

MISS DUNBAR: Yes, sir.

MR. WAGNER: Geoffrey Mandley.

[66] MR. MANDLEY: Here.

MR. WAGNER: Don Johnson. Gerald Hale, Susan or Sue Attaway. She is here. Juna Cox.

MR. COX: Here.

MR. WAGNER: Janice Halker.

MISS HALKER: Here.

MR. WAGNER: Robert Tilchen.

(No response.)

MR. WAGNER: We will be responsible in the event we determine to use him. I have not seen him around the Courtroom. I am not asking for any capias from the Court.



THE COURT: I will depend on counsel to see that the witnesses who are not present do not come into the Courtroom while the case is in progress.

MR. WAGNER: We will accept that responsibility, Your Honor.

Ronald Stahl.

[67] MR. STAHL: Here.

MR. WAGNER: Gene Brandon.

MR. BRANDON: Here.

THE COURT: Swear the witnesses, Mr. Clerk, please.

(Whereupon, 13 witnesses were duly sworn, en masse.)

THE COURT: The witnesses in this case other than Mr. Dinitz will retire from the Courtroom and remain outside of the Courtroom until you are called into the Courtroom to testify.

While this case is in progress, you are not to discuss this case among yourselves or with any other persons and you are not to allow anyone to discuss this case in your presence or hearing.

You may discuss this case with the attorneys in the case, but only outside of the presence of each other.

The witnesses may now retire and the Marshal will show you where to remain.

MR. REED: Your Honor, the Government respectfully [68] requests an exception to the Rule for Mr. Juna Cox, who is the chief investigator of this case and also will be our first witness.

MR. WAGNER: The Defendant objects to Mr. Cox remaining in the Courtroom under the Rule on the ground, if Your Honor please, that hearing the testimony of other witnesses by the primary Government witness would prejudice and bias this Defendant's case.

THE COURT: The objection is overruled. The Government has the right to have a representative at the counsel table. Have a seat.

(Whereupon, the Rule was invoked.)

MR. MELDON: Your Honor, we would inquire as to whether or not the Government representative will be called first.

THE COURT: I think that is immaterial in view of my ruling. I assume that he is, but it really doesn't make any difference. I have ruled that he has the right to stay there, so we will continue.

Now, I want to tell counsel now that only one counsel for the Defendant is going to be able to be on his feet at one time. Only one counsel will be able to participate [69] at a time and I want to make that clear before we proceed further.

MR. WAGNER: Is that also true, Your Honor, of the prosecution. I noted this morning that both Mr. Gross and Mr. Reed participated in the argument, although I made the entire argument myself.

THE COURT: You asked me a question, did you not?

MR. WAGNER: Yes, sir.

THE COURT: The answer is that it does apply.

MR. WAGNER: Thank you.

THE COURT: The Government may make its opening statement.

MR. REED: Thank you, Your Honor.

Good afternoon, ladies and gentlemen of the Jury. My name is David Reed and I am with the Justice Department. With me at counsel table on the far side is Mr. Robert Crongeyer, Assistant United States Attorney, with whom I will share the presentation of this case and Mr. Juna Cox, the Government witness who you will first hear.

[70] We are here this afternoon pursuant to an indictment returned by the ladies and gentlemen of a Grand Jury against the Defendant, Nathan George Dinitz. There are two counts that refer to Mr. Dinitz, one being a conspiracy count which charges that on or about October 23rd the Defendant, with Edward Horace Reese, did knowingly, intentionally combine, conspire, confederate to commit offenses against the United States, to wit, to distribute controlled substances in violation of Title 21, United States Code, Section 841(A)1.



The other count against Mr. Dinitz is that he knowingly and intentionally did distribute approximately 48 tablets of lysergic acid diethylamide, commonly known as LSD, which is a hallucinogenic drug and a controlled substance under the law.

The facts of this case are very simple. At approximately 12:00 o'clock in the afternoon on the 25th of October Mr. Dinitz did sell to Agent Cox 48 tablets of lysergic acid diethylamide. Mr. Cox will testify when he takes the stand that he had gone to Mr. Dinitz's residence which is at 1806 Northwest 2nd Avenue here in Gainesville in order to see Ray, who was Mr. Dinitz's roommate.

Ray was not there. However, Agent Cox was told, was asked why he was there. He then said, well, I will come back later, and the Defendant's response was that is cool, I [71] am his roommate, what do you want, and he said, well, I was supposed to be here to see Ray and he said then, the Defendant then said do you want to buy some mescaline, to which Mr. Cox agreed and did, in fact, buy the mescaline from the Defendant at that time and place.

The second Government witness will be the chemist who analyzed this material and found it to be as the Defendant has conceded, lysergic acid diethylamide.

As you listen to the testimony here coming from the stand and view whatever real evidence is introduced, I will ask you not only as far as time goes, to listen to what is said, but also to analyze why it is said, that it is what possible interest, be that friendship, professional or what type might tend to color a witness' testimony and focus on the issue which is at hand, which is, did the Defendant sell this drug at this time as alleged in the indictment and I feel that if you do this you will return a verdict of guilty as charged.

Thank you.

THE COURT: For the defense, Mr. Wagner?

MR. WAGNER: Judge Middlebrooks, ladies and gentlemen of the Jury, I am Maurice Wagner.

I practice—I am an attorney at law and I practice in Daytona Beach, Florida. I am here to assist in the

[72] trial of the United States of America vs. Nathan Dinitz.

I will be assisted in this trial by two other co-counsel, Mr. Fletcher Baldwin and Mr. Jeffry Meldon, both of Gainesville.

All of us are representing Nathan Dinitz. I wish I can agree with counsel for the State that the facts in this case are simple because they are anything but that.

After working on this case over a period time it appeared to me that if we would given nomeclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—

MR. REED: Your Honor, we object to personal opinions.

THE COURT: Objection sustained. The purpose of the opening statement is to summarize the facts the evidence will show, state the issues, not to give personal opinions.

Proceed, Mr. Wagner.

MR. WAGNER: Thank you, Your Honor. I call this the Case of the Incredible Witness.

MR. CRONGEYER: Your Honor, I object.

THE COURT: [73] Objection sustained. I do not want to remind you again, Mr. Wagner, about what the purpose of the opening statement is.

MR. WAGNER: Yes, sir, Your Honor. I am sorry. I didn't realize that that was improper. In any event—

THE COURT: Are you suggesting—take the Jury out, will you, Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: Mr. Wagner?

MR. WAGNER: Yes, sir.

THE COURT: You appeared at this trial late. You showed up, you were not counsel of record, you have never filed an appearance. This Court was not aware of your participation until the Jury was to be selected.

I do not approve of your behavior and if you attempt to bait this Court once again, I am going to refuse to



allow you to practice law in this Court again. Do you understand me?

MR. WAGNER: [74] Yes, sir.

THE COURT: Call the Jury back in.

MR. WAGNER: If Your Honor please, I have been here for the past four days. I have been—I have driven back and forth from Gainesville almost everyday.

THE COURT: You have not filed an appearance in this case. I understood when we started to select the Jury that you would participate and did not require you to file an appearance because you stated to me that you were appearing.

The point I wish to make is that suddenly after your appearance motions, the motion to suppress which is obviously frivolous start to appear. You are also attempting to bait this Court and one more dispute with you, Mr. Wagner, and you will no longer be counsel of record in this case. Do you understand me?

MR. WAGNER: Yes, sir, but I don't know—

THE COURT: Well, have your seat now.

MR. WAGNER: Yes, sir.

THE COURT: [75] Call the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Are you ready to proceed, Mr. Wagner?

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: You may proceed.

MR. WAGNER: Ladies and gentlemen, the purpose of an opening statement is to attempt to clarify the issues or the questions which you as the Jury men and women will be called upon to determine and decide when all of the evidence has been received and Judge Middlebrooks has instructed you as to the law and once you have had an opportunity to hear argument of counsel for both the United States and for the Defendant, Nathan Dinitz.

The purpose is to clarify those issues, to pinpoint them wherever possible so there is no confusion and just

exactly what it is you are called upon to determine in this case.

As I stated earlier, I don't agree with counsel for the Government that the facts in this case are, in fact, simple, because they are nothing but simple.

[76] Let me say this. I will appear and we contend that the evidence in this case will show that the sole and only testimony which the Government may have to offer in this entire case will come from the mouth of a single witness, Mr. Juna Cox, who sits here at the prosecution table.

It will not be corroborated. The evidence will show that there is no corroboration whatever from any—

MR. CRONGEYER: Your Honor, excuse me. I hesitate to object, but my understanding of the opening statement is that it is counsel's opportunity to preview their own cases and not to cross examine and attack the case of the other side.

THE COURT: Take the Jury out, Mr. Marshal.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: Mr. Wagner.

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: The purpose of the opening statement is not to make a final argument.

MR. WAGNER: Yes, sir, Your Honor.

[77] THE COURT: Call the Jury back in. Do not do it again.

MR. WAGNER: Yes, sir.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: You may proceed, Mr. Wagner.

MR. WAGNER: I apologize to you, ladies and gentlemen.

The Government in its opening remarks read in general terms the indictment against Nathan Dinitz. The indictment covered two charges. First, the Government alleges conspiracy and this is simply an agreemnt. May I discuss this, Your Honor?



THE COURT: Yes, sir.

MR. WAGNER: Thank you. A conspiracy is simply an agreement between two or more persons to commit an illegal act and then some overt act or some affirmative act in furtherance of that agreement, and in general terms it is the opposition that the evidence will show that there was no agreement whatever between Nathan Dinitz and anyone in this case and that the Government will not be able to produce evidence of any such [78] agreement.

Of a second matter, Nathan Dinitz is charged in the second count with the sale of an illegal substance, and that evidence, ladies and gentlemen, must come from the witnesses who appear on behalf of the Government in the form of Mr. Juna Cox.

Now, we believe the evidence in this case will show, as I stated earlier, the facts are anything but simple. We believe the evidence will show that this entire matter occurred or began, it had its inception, its genesis on October 23, 1972, approximately four months or five months ago.

The evidence will show, and incidentally, let me say this to you at this time, if I may, an opening statement, as His Honor has previously suggested to you, is not evidence. Nothing that I say in this case has any evidentiary value anymore than anything that counsel for the prosecution may say, but it is the sworn testimony of the witnesses that you must base your decision upon.

However, I think it is the obligation of counsel to be full and fair in an opening statement, and I am going to do just that.

I want you to hold me responsible for doing just that during this trial. I believe the evidence in this case will show that Nathan Dinitz is a law student attending the University of Florida in his third year, his last year of [79] law school, and it has been his practice in the past, he goes to school during the two winter months and goes home on summer vacation and works to earn the sufficient funds to come back and go to school the next semester.

The evidence will show that that happened in 1972, and that in July of 1972, Nathan Dinitz did, in fact, go home on vacation.

The evidence will show that Nathan Dinitz lived in a house at 1806 Northwest 2nd Avenue in Gainesville and that house will be described to you by the testimony. It is a small house, but it has five small bedrooms, each occupied mostly by students going to the University.

The evidence will show that Nat Dinitz was either there before anyone else, or the second. I think there was one man, Jeffrey Mandly, was there before he moved in, just a few days before, and that Nathan Dinitz lived there for over a period of approximately two and a half years.

The rooms are occupied by students who see an ad in the paper or on the student bulletin board and move in, and on this particular occasion in July of 1972 when Nat Dinitz went home on vacation, someone else living in the house rented a room to the alleged co-defendant in this case, the alleged co-conspirator, a man whom you will hear called Ray.

Please try to remember that, a man called Ray, but whose real name is Eddie or Edward Horace Reese, and it [80] is this man with whom the Government contends Nat Dinitz entered into a conspiracy with.

The evidence will show that Nat Dinitz never knew or ever heard of Eddie Horace Reese or Ray in July when he went home on vacation, the summer to work, and that in fact the room was rented by one of the other people living there, a room was rented to a man named Eddie Horace Reese.

Everyone in that house, the evidence will show that everyone knew this man under one name, Eddie.

The evidence will show that Nat stayed home until October 1st, when he returned to go to school and that Eddie Reese lived in that house July, August and September of 1972, never having seen, heard or met Nat Dinitz, and that Nat returned approximately on about the 1st of October of 1972 and this date is important because it is just about three weeks before all of these events occurred.



Now, I will ask you to keep that date in mind. Nat returned to Gainesville, Florida, he returned to school on October 1, the evidence will prove this to your satisfaction, and some days later, and for the first time saw Eddie Reese.

The evidence will show that Nat Dinitz and everyone in that house made every effort to get Eddie Reese out of that house, that Nat Dinitz ordered him out, as a matter of fact, the evidence will show, ladies and gentlemen, that the only time in the next three weeks, the only time, and [81] until this incident occurred, that Nat Dinitz was ever seen to speak to or say a single word to Eddie Reese was when he told him to get out, move out of that house, and you will understand why.

The evidence will show that during the period of time that Eddie Reese lived there and he lived with other people in that house, and you will hear their testimony, they were there longer than Nat, that they observed on at least six occasions this man, Eddie Reese, smoking marijuana.

One of the men living in the house is a police officer with the City of Gainesville. You will hear his testimony and he ordered Eddie Reese out when he learned of it. This happened on at least six or more occasions.

Now, the evidence will show that Eddie Reese at approximately 21 or 22 years old, he is a fugitive from justice and we don't have him here, the evidence will show that Eddie Reese, approximately 21 or 22 years of age, living in that house, as I stated earlier, was an unemployed sometimes bartender, whereas Nat Dinitz is a young man who, after some years, has attended New York University, graduated from the School of Social, a new School of Social Sciences in New York, scholarships, came to Florida, entered the law school and was an excellent student, thought well of by all of his friends, all of his associates.

THE COURT: [82] Mr. Wagner, the evidence will not show that because it will not be admissible. Relate your arguments to the facts that you expect the evidence to show, the admissible evidence.

MR. WAGNER: Yes, sir. The evidence will show that nothing about these two men was so alike that they could have been friends or conspirators or even had anything to do with one another. The evidence will show that sometime on or about October 24, 1972, Mr. Cox allegedly, and this we have to rely upon the Government because we know nothing about it, but the evidence will show this in any case because we propose to call Government witnesses.

The evidence will show that on or about October 24, 1972, Mr. Cox met some unknown white male who directs him to this house where these students and people lived, some of them graduate students and where Eddie occupied a room.

The evidence will show—oh, incidentally, the evidence will show that Eddie lived in a room and this may be important, in a room that was immediately to your right as you enter the living room.

You walk into the front door, you are in the living room and just a matter of two or three feet to your right is a room that Eddie Reese occupied.

The evidence will show that Nathan Dinitz [83] occupied a room at the far end of the house, as far away as three or four rooms in between, and we will admit we will offer in evidence a diagram of the entire house done to scale by an architect here, showing the qualified drawing of the premises, so that you can understand just exactly what the setup was in the house.

The evidence will show, and we contend, in any event that on the 24th Mr. Cox may or may not have purchased 20 tables of some controlled substance from Eddie Reese, a man whom he knew as Ray.

The evidence will show to your satisfaction that Nat Dinitz was not there, knew nothing about this incident and that on the following day, and for some unknown reason—I beg your pardon, that on that day, on the 24th and after purchasing a controlled substance from Eddie Reese, Mr. Cox made an appointment to see him again that evening at 10:30 at that same house, to see Ray, and for some reason or another didn't return on that evening but returned the following day.



At this point, the evidence will show he never heard, never saw and knew nothing of Nat Dinitz.

When he returned he knocked on the door, Nat was in the living room and he asked for Ray.

Nat said come on in. The evidence will show that Mr. Cox asked for Ray and Nat said nobody named Ray lives [84] at this house, at which time Mr. Cox gestured toward the room immediately to his right, keeping in mind that he had been there the day before, and said the man that lives in this room, and Nat said you mean Eddie, and then a conversation proceeded to this degree.

The evidence will show to your satisfaction and you will hear this testimony that Mr. Cox then, after gesturing to the room and after identifying the person living there, Ray being Eddie, said he was supposed to have a package for me and Mr. Dinitz said I know nothing about it, at which point Mr. Cox, and these are general terms, ladies and gentlemen, you will hear the testimony from the witness stand, at which point Mr. Cox said, do you mind if I look in his room, which was open, and Mr. Dinitz said I don't care, it is not my room, and walked out of the living room, at which time Mr. Cox proceeded into Eddie's room in the presence of witnesses, then came back out of that room and left the house.

Ladies and gentlemen, as I said before, hold me responsible for this evidence. The evidence will show to your satisfaction—

MR. CRONGEYER: Your Honor, excuse me. This gentleman has said that the evidence will show to the Jury's satisfaction about four times now and I think the Jury can best determine what • • •

[85] THE COURT: The objection is overruled.

MR. WAGNER: Now comes the interesting part of this case, ladies and gentlemen, that, incidentally, is the sole basis, that particular incident on the 25th is the sole basis for the Government's charge against Nathan Dinitz, nothing else ever happened but something else did happen.

The evidence will show that Juna Cox never bought anything from Nat Dinitz. As a matter of fact, the

evidence will show on the 26th, the following day, he returned to the house again and met Nat Dinitz and said I would like to buy some drugs and Nat Dinitz said, man, don't come around here, we don't sell drugs around here. If you want to see Ray, you see Ray. Ray is not here, but that didn't stop him.

He came back two days later and made the same effort and at this time brought another Government witness, and we will produce her for you, he brought another Government Agent, Sue Attaway, and together they attempted to persuade Nat to sell them some drugs and Nat said, look, please quit coming around here, and they came a third time or a fourth time, I am not sure, you will hear this testimony, and again, and they phoned a half a dozen times in this interim, phoning for Nat, phoning for Ray, sometimes the phone was answered by [86] himself, each time attempting to persuade someone in that house to sell him some drugs, and each time he was unsuccessful.

In any event, nothing happened until December 8, no arrests were made of Eddie or anyone else, and on December 8, on December 8 the United States Marshals, along with some others, some other officers of the law, came to 1806 Northwest 2nd Avenue in Gainesville, Florida, at approximately 5:30 in the morning, banging on the door.

Debbie Dunbar was the first to awake. She resides in the house. She proceeded to the front door and when they announced they were United States Marshals and because Nat Dinitz is a law student and knew more about it, she went back.

THE COURT: What has this got to do with this case, Mr. Wagner?

MR. WAGNER: Everything to do with it, Your Honor.

THE COURT: The arrest?

MR. WAGNER: I beg your pardon?

THE COURT: The arrest by the Marshals?

[87] MR. WAGNER: I think so, Your Honor.

THE COURT: You have five more minutes.



MR. WAGNER: All right. In any event, the Marshals entered, they were looking for Eddie Reese, they had no warrant for Nat Dinitz, everyone gave them their names and showed them their license and they left, and only to return two hours later as an afterthought to arrest Nat Dinitz.

Nat was arrested, released on bond and now, ladies and gentlemen, really comes the unusual circumstances.

Some week or ten days later Nat began to get telephone calls offering—

MR. CRONGEYER: Your Honor, I object to any comments of this nature. It is totally irrelevant. I ask that the Jury be excused, Your Honor.

THE COURT: Take the Jury out, please.

(Whereupon, the Jury was removed from the Courtroom and the following proceedings were had:)

THE COURT: What were you going to say next or present to the Jury next?

[88] MR. WAGNER: If Your Honor please, I was going to present the fact that there was an extortion attempt made against Mr. Dinitz.

THE COURT: Will you connect this officer with it?

MR. WAGNER: Yes, sir, if you give me an opportunity to, if you hear me out, I think—

THE COURT: All right, go ahead.

MR. WAGNER: I trust that you will. The evidence will show, Judge, what I propose to say to the Jury is—may I step forward so I don't have to speak too loud?

THE COURT: Yes, sir.

MR. WAGNER: That sometime after his arrest and his release on bond he was contacted by telephone by someone who said that he could quash these charges against him, that the case would never come to Court in exchange for $2,000.00, that he notified his attorney who then called the F.B.I. and that Mr. Hale, Mr. Gerard Hale and Mr. Dan Johnson were called in, and they spoke with Nat, and after speaking with him they set up a [89] time when the next telephone call was to come in, they came to 1806 Northwest 2nd Avenue and awaited the call. The call came in at the appointed time, at 6:30.

The call told Mr. Dinitz to put the $2,000.00 in an envelope, to take it to a 7-11 behind the University Book Store and he would receive further instructions by telephone there, that the F.B.I. men then sliced up some paper, put it in an envelope, gave it to Nat and told him to proceed to the 7-11 and they went along with him.

They went inside and read papers while he remained outside at the telphone and the phone call came in.

The phone call directed Nat to take the money—

THE COURT: Look, you can shorten this. I appreciate your—

MR. WAGNER: If you give me two more minutes.

THE COURT: Well, you will have more than that. Let's get to this witness. I want you to connect it with this witness and do it hurriedly. The Jury can listen to it if it is admissible. Let's get to the point.

MR. WAGNER: The evidence will show that they set up a surveillance, that a man made a pass at the Dempster Dumpster in the presence of two F.B.I. Agents, or at least one of them, [90] I am not sure, I have not talked with them, Judge, but the evidence will show that they were there, they saw the man, the man reached under the Dempster Dumpster and grabbed the money and got away, and that this extortion attempt, if Your Honor please, the F.B.I. can identify this man, they can describe him. I don't know what the description is, but certainly it would lend credence to Mr. Dinitz's defense.

THE COURT: Well, now, you still have not answered my inquiry.

MR. WAGNER: Yes, sir.

THE COURT: Would you please listen to my question because I want you to be sure and understand me.

MR. WAGNER: Yes, sir, Your Honor.

THE COURT: How do you link that to this Government witness, Agent?

MR. WAGNER: How do we link it?

THE COURT: Yes.

MR. WAGNER: [91] Well, we believe that it can be linked on two basis.

THE COURT: All right.



MR. WAGNER: If the description fits that of Juna Cox, then Juna Cox's credibility is in issue and inasmuch as the Government is relying upon his testimony alone the Jury has a right to test his credibility by reason of any illegal acts which he himself may commit.

If, on the other hand, that description fits Eddie Reese, if that description fits Eddie Reese and we have not been able to secure that description, but if it fits Eddie Reese, then it indicates clearly that Eddie Reese or the Jury could well find that Eddie Reese committed this act with the intention of extorting money from Nat Dinitz and was simply unsuccessful in doing so.

THE COURT: Call the F.B.I. Agents now. I want them in here now, and if you cannot convince me that this testimony is admissible you will leave this court house today.

MR. WAGNER: Yes, sir.

THE COURT: And not only that, you will not come back.

[92] MR. WAGNER: If Your Honor please, let me make an objection.

THE COURT: You just have a seat.

MR. WAGNER: I would like to make an objection.

THE COURT: Have a seat, Mr. Wagner. Is this one of the witnesses?

MR. WAGNER: I have never seen them, Judge. If this is Mr.—what is your name?

MR. CRONGEYER: This is Mr. Johnson with the F.B.I.

THE COURT: Do you mean you are making these statements to the Jury and you have not even talked to this man?

MR. WAGNER: I have evidence, if Your Honor please,—

THE COURT: Where did you get it and tell me what it is.

MR. WAGNER: I just outlined it, Judge.

THE COURT: Where did you get it?

[93] MR. WAGNER: Mr. Meldon, Mr.—

THE COURT: Let Mr. Meldon come up and examine these witnesses if he has talked to them.

MR. WAGNER: Yes, sir.

THE COURT: Have you talked to them, Mr. Meldon? On your feet.

MR. MELDON: Your Honor, I have talked to Mr. Johnson. I have not talked to Mr. Johnson extensively since the date of the extortion incident.

THE COURT: Has anybody told you or do you have any information that this man, Cox seated here, was described as the person getting that envelope from that Dempster Dumpster, or whatever it is?

MR. MELDON: Your Honor, I have—

THE COURT: Answer my question.

MR. MELDON: I have no information that would lead me to [94] believe it was any person. I have not had that person described to me.

MR. CRONGEYER: Your Honor, may I be heard on this?

THE COURT: Yes, sir, you may.

MR. CRONGEYER: Your Honor, I think this constitutes a personal assault on a man's reputation. It is groundless character assassination. It is slanderous and grounds for a civil suit and has no basis whatsoever in fact.

THE COURT: Is this all you have, counsel for the defense, as far as this witness Cox is concerned?

MR. MELDON: I—

THE COURT: Just answer yes or no. Don't waste the time of the Court any further.

MR. WAGNER: I beg your pardon, Your Honor.

THE COURT: Is this all of the evidence you have to connect this witness to Cox to that Dempster Dumpster?

MR. WAGNER: [95] I don't know what better evidence than the F.B.I. themselves.

THE COURT: You will leave this Courtroom immediately and you will never practice law in this Court again, Mr. Wagner. I direct you to leave now. Mr. Marshal, see that he leaves the building immediately.

You two gentlemen may retake your seats in the witness room.

This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination, and I hope, Mr. Meldon, that you are not responsible or any part of it. I will ask you now if you are. Did you discuss with Mr. Wagner what his opening statement was going to consist of and the evidence that he was going to attempt to put before this Jury with respect to those phone calls and extortion attempts?



MR. MELDON: Your Honor, I did not prepare the opening statement and Mr. Wagner prepared his opening statement independently.

THE COURT: This is the worst exhibition I have seen. I am going to inquire of you further as to your knowledge of what Mr. Wagner was attempting to do. [96] Mr. Wagner knew without a doubt that this was inadmissible, highly prejudicial and nothing but character assassination, and I am going to inquire of you further, and if I find that you had anything further to do with it I am going to take further action in your regard, too.

Mr. Baldwin, did you know what this lawyer was going to attempt to do before this Jury?

MR. BALDWIN: No, Your Honor.

THE COURT: Have a seat, sir.

MR. CRONGEYER: Your Honor, we have some evidence that Mr. Meldon in fact did know of this beforehand.

THE COURT: I would like to hear it.

MR. CRONGEYER: And I think Mr. Reed and myself both know of this.

THE COURT: You have knowledge of this of your own personal knowledge?

MR. CRONGEYER: Personal knowledge, yes, sir.

THE COURT: [97] Let me hear from you.

MR. CRONGEYER: Your Honor, we talked about this with Mr. Meldon beforehand. We discussed it, in fact, last night at the Flagler Inn where we were presently staying. We were told at that time that this was the evidence sought to be elicited at this trial and we expressed our belief at that time that it was groundless, that there was no connection with Mr. Cox, no evidence to this effect whatsoever and that we felt it would be uncalled for.

THE COURT: Mr. Meldon knew this?

MR. CRONGEYER: I believe he did know of this thing beforehand.

THE COURT: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently you called him in to be associated with you.

Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner.

MR. MELDON: Your Honor,—

THE COURT: [98] And to prejudice this Jury.

MR. MELDON: Your Honor, Mr. Wagner has been involved in this case for at least a week and a half. I was completely responsible for the preparation of this case up until that time. Since that time, I have taken over—I have done investigation into the case, but I have not been responsible for the preparation of the opening statement, of examination of the witnesses and the information that I conveyed to Mr. Wagner concerning the incidents that happened with the F.B.I. were factual and truthful and any statements that were given to him, he made a determination as to what had happened.

I have not at anytime represented to him that Mr. Cox was an Agent involved in extorting any money.

THE COURT: Did you and he discuss the admissibility of this testimony that he was going to tell the Jury was going to be put before them?

MR. MELDON: No.

THE COURT: Are you in a position to proceed now or do you need some additional time to prepare and discuss this case with the witnesses?

MR. MELDON: [99] I need additional time to prepare in that I have not discussed it with the witnesses and Mr. Wagner has done all of the preparation.

THE COURT: Call the Jury back in. Wait just a minute. It is your responsibility to contact your witnesses and discuss this case with them between now and 9:00 o'clock tomorrow morning, because that is



when we will continue. You started to say something, Mr. Dinitz.

MR. DINITZ: No, sir.

THE COURT: Call the Jury back in.

(Whereupon, the Jury was returned to the Courtroom and the proceedings continued as follows:)

THE COURT: Ladies and gentlemen of the Jury, it is going to be necessary that we take a recess in this case until 9:00 o'clock tomorrow morning. I want to impress upon your minds that during this recess you are not to discuss this case with anyone. You are not to allow anyone to discuss this case in your presence or hearing.

You are further instructed not to arrive at any conclusion in this case. I am going to further instruct you not to read any newspapers until this case is concluded, [100] not to look at any television news programs, or not to listen to any radio news programs while this case is in progress and until it is concluded.

MR. MELDON: May I approach the bench, Your Honor?

THE COURT: Yes, sir.

(Whereupon, the attorneys approached the bench and the following conversation was had outside the hearing of the Jury.)

MR. MELDON: The Defendant has stated to me that since I was not hired to argue the case he is in a quandary because he hired Mr. Wagner to argue the case and he feels he needs more time to obtain outside counsel to argue the case for him.

THE COURT: That comes too late. You are his counsel and have been. I will consider it between now and 9:00 o'clock tomorrow morning.

(End of conference at the bench.)

THE COURT: Call the witnesses in in this case, please.

Ladies and gentlemen, we are going to take a recess until 9:00 o'clock tomorrow morning. During this period of time you are not to discuss this case either among

[101] yourselves or with any other persons. You are not to allow anyone to discuss this case in your presence or hearing.

You may discuss this case with the attorneys in the case, but only outside of the presence of each other, and I stress, only outside of the presence of each other.

You may now take a seat out in the Courtroom. We will stand in recess until 9:00 o'clock A.M. tomorrow morning.

(Whereupon, at 2:53 P.M. the hearing in the above-entitled matter was recessed, to reconvene at 9:00 o'clock A.M. the next day.)



[102] MORNING SESSION

February 16, 1973
9:00 O'clock A.M.

IN CHAMBERS

THE COURT: Did you gentlemen have some matter you wished to present to me?

MR. MELDON: Yes, Your Honor. The counsel at this time is in a difficult position as far as going forward representing the Defendant, Nathan Dinitz. After spending considerable time looking into the law it is my opinion and I believe the opinion of Professor Baldwin that the action of the Court yesterday was well within the discretion of the Court and would not be reversed by the Court of Appeals.

This would leave the alternative to the Defendant of either going forward on his motion regardless of the advice of counsel or requesting a mistrial or he could ask for a motion—he could submit a motion to recess and ask that he go forward.

The Defendant at this time is in a financial bankrupt position and does not have the funds to go forward with an appeal.

This is subject to the Defendant getting money at some other time, but the defense counsel, I don't even know [103] if it is ethical for me to absorb any costs for an appeal, but I am certainly not in a position to do it, and I think that there is a serious question as to whether or not there is any substance to the appeal and I think that the Defendant would have the option of requesting a mistrial and that I would advise him to request that, but I cannot require him to do that, and the Defendant has also indicated to me that he wants Mr. Wagner to try his case.

He does not want me to try his case. I am also in a position where I feel that I could not try the Defendant's case after the opening remarks by counsel Wagner, and that I would not be able to give the Defendant a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening

remarks, and I was not part of the preparation of the opening remarks, and I am in a position where I at this time am not sure how to proceed.

THE COURT: Do you have anything you wish to say, Mr. Crongeyer?

MR. CRONGEYER: No, sir, Your Honor. I don't think there is anything I can add to it or offer concerning it. I think we stated in our response or our telegram to the Fifth Circuit all of our position on the thing, and I believe you were [104] furnished with a copy of that telegram.

THE COURT: Let me make some observations. There are a number of avenues that could be taken. Professor Baldwin, do you have anything you wish to say?

MR. BALDWIN: No, Your Honor, except that when you or when the Court dismissed Mr. Wagner yesterday, my immediate reaction was to attempt to get some research on the matter which I did at the law college, attempting also to get some advice from the Clerk of the Fifth Circuit as to what to do now, since immediately upon leaving the Court yesterday Mr. Dinitz did inform both of us that he would not be represented by either one of us.

I am not a trial attorney, so obviously not myself in the matter. After a full night's research it is my conclusion that the Court's action was proper and that the only possible way that it would be an appeal from that would be if Mr. Wagner returned to the Court and was then held in contempt of court.

Therefore. I believe our hands are pretty much tied, since Mr. Dinitz will not let Mr. Meldon go forward.

As far as appeal grounds, which is where I come in, as far as helping to advise the student, at this juncture I have difficulty seeing any basis for appeal.

[105] THE COURT: Let me make some observations. There are a number of avenues, one of which was the application to the Court of Appeals for a stay or a recess pending a disposition of this matter of the expelling of counsel who was not counsel of record in this case and who did not appear until the day the Jury was to be selected, and who apparently at that point was attempting to just take over the defense.



Another avenue is to proceed to trial which apparently, at least today, is not possible since Mr. Dinitz has indicated to you two gentlemen that he will not allow you to proceed in his behalf, which would mean that then he would be left without counsel.

The third avenue would be to declare a mistrial in this case, thereby leaving the Defendant with the opportunity to obtain counsel.

Factually this Court is obviously of the opinion that Mr. Wagner's conduct is reprehensible. In his opening statement, prior to the time that the Court stopped him, and ordered him to leave the Courtroom and allow counsel who represented Mr. Dinitz to continue, he made a number of statements which were prejudicial to the Government.

He left in the minds of the Jury the thought that there was either some conspiracy against Mr. Dinitz or that he was being the victim of an extortion attempt by the [106] Agent for the Government, even though he did not completely get into the factual matter surrounding that extortion attempt.

He did, however, make a statement to the Jury which was highly prejudicial involving the failure of the Government Agents to arrest him at the time they first went to the premises for the purposes of arrest.

Any experienced trial attorney, and especially one of Mr. Wagner's experience, knows that that is highly improper and highly prejudicial to the Government.

The two F.B.I. Agents involved in the investigation of the extortion attempt were examined by this Court in camera and they stated that they had never discussed this case with counsel for Defendant at all, that the person who allegedly picked up the package which contained the fake money had no resemblance whatsoever to the Government Agent.

For the record, the Government Agent is approximately 5 feet 5 or 5 feet 6. The person who picked up the money according to the Agents, was at least 6 feet 1. To quote one of the Agents, there was as much difference in the resemblance of this Agent and the man that picked

up the money as night and day, and I am quoting from the Agent himself.

There was obviously an attempt by the Counsel making the opening statement for the Defendant to prejudice that Jury against the Government to where there could not [107] possibly be a fair trial.

There was also an announcement over the local news media last week that during this period of time when this case would be tried there was going to be a shocking matter that the public would hear of.

That could only have been referring to this trial. That was evident because of the crowd that appeared for this trial, including news media, representatives and others in the community, at least three or four times as many spectators as has appeared in any other of these cases which started being tried on February 6th.

There is bound to be widespread publicity, if it has not already occurred having to do with this trial, having to do with an alleged extortion attempt directed at the Defendant.

Defense counsel on numerous occasions in the opening statement attempted to argue the case, not factually as he was required to do, but making and giving his own personal beliefs as to what the evidence was in this case. He ignored the Court's admonition to desist.

Because of all of these reasons and because of the fact that the Jury was sent out on numerous occasions and now the counsel who was making the opening statement for the Defendant will not be present, I am seriously considering granting a mistrial because of the fact that the Government [108] nor the Defendant could get a fair trial. I am going to consider that for a period of time and I will advise counsel what my decision is with respect to the future progress of this litigation.

In the meantime, I think counsel for the Defendant ought to inquire as to what he wishes to do, whether he wishes to have a recess so that he can obtain other counsel or whether he wishes to move for a mistrial.

I would also suggest to the Government that they consider what the position of the Government would be with respect to a mistrial in this case and have this case tried at a later time when there is a possibility



that this widespread publicity would not permeate the atmosphere.

I will talk to you gentlemen later as soon as you have had an opportunity to consider the comments I have had to make. I will not enter an order to allow this man to proceed further in connection with his request of the Fifth Circuit Court of Appeals for a stay order to have this attorney who was removed from the Courtroom to represent him further.

I will not allow, enter an order to allow him to proceed in forma pauperis. It is my opinion that that would be frivolous and I will not enter such an order.

If the Defendant is financially unable to proceed in the defense of this action, the Court will, of [109] course, entertain a motion to have him declared a pauper so that he can get counsel together with investigative services and other costs being furnished at the expense of the Government.

Are there any questions as to my remarks?

MR. CRONGEYER: We have none.

THE COURT: Or the statements that I have made to counsel?

We will take a approximately thirty minute recess while you have an opportunity to consider our discussion.

(Brief recess taken.)

IN CHAMBERS

THE COURT: Have you gentlemen any further thoughts about how we should proceed in this matter?

MR. MELDON: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

THE COURT: What does the Government have to say?

[110] MR. CRONGEYER: Your Honor, we have discussed this at some length and we think that for the reasons you have set forth already on the record a mistrial

might be appropriate in this case, and the Government would not oppose a mistrial.

THE COURT: Then I am going to declare a mistrial, gentlemen. I think under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

All right, let's go in the Courtroom.

MR. MELDON: Your Honor, may I inquire further as to whether or not you intend to reset it for this term?

THE COURT: No, sir, I will not reset it for this term because I do not think sufficient time will have elapsed to give the Government and this Defendant the proper atmosphere unless there is some objection to that.

MR. MELDON: No, no objection on the part of the Defendant.

THE COURT: How about the Government?

MR. CRONGEYER: Your Honor, we have no objection.

[111] MR. MELDON: Thank you, Your Honor.

(Whereupon, the conference in chambers was concluded.)

THE COURT: Good morning. Be seated, please.

Ladies and gentlemen of the Jury, the Court has decided to declare a mistrial in this case. It will therefore not be necessary for you to deliberate in this case. You are therefore discharged as the Jury selected to try this case. Those of you who came in to serve beginning on February 6, 1973, are discharged as Jurors for this term of Court. Those of you who reported on the 12th of February will report back at 9:00 o'clock A.M. on Tuesday, February 20, at which time we will proceed to begin the trial of some other cases.

I understand from the Clerk that there are no Jurors on this Jury who reported on the 6th. All of you, then, will report back on Tuesday, the 20th of February at 9:00 o'clock A.M.

We will stand in recess until Tuesday, February 20, 1973, at 9:00 o'clock A.M.

(Whereupon, at 10:10 A.M. the hearing in the above-entitled matter was concluded.)



[112] IN CHAMBERS

February 23, 1973
9:00 o'clock A.M.

THE COURT: This is a hearing on a motion filed by Mr. Meldon to withdraw in Gainesville Criminal No. 1365, United States of America vs. Nathan George Dinitz.

Mr. Dinitz, have you had an opportunity to look at that motion?

MR. DINITZ: Yes, sir, I have.

THE COURT: Do you have any objection to his withdrawing?

MR. DINITZ: Well, I prefer not to answer until I have consulted with counsel. I plan to submit a motion for reinstatement of Maurice Wagner as counsel.

THE COURT: The question to be decided here is if you intend to insist on Mr. Meldon remaining as counsel.

MR. DINITZ: Well, I don't think I can make an adequate appraisal without consulting my attorney.

THE COURT: Mr. Meldon, in the motion you state there are [113] irreconcilable differences, is that right?

MR. MELDON: I believe so, yes, sir.

THE COURT: And you do not desire to proceed further?

MR. MELDON: No, I do not, Your Honor.

THE COURT: I am going to grant your motion. Perhaps a short order for the Court to sign allowing you to withdraw.

MR. MELDON: Thank you, Your Honor.

MR. DINITZ: Your Honor, at this point I would like to mention that I have spent quite a bit of money in attorney's fees and I now find myself with no attorney to represent me.

THE COURT: Mr. Dinitz, I thought I had already made this clear, but I am not sure you were present. If you are unable to hire an attorney, if you are unable to pay costs and the necessary fees for any investigative services there is a provision for the Court to appoint competent counsel to represent you in this case at no expense to you, and at no cost to you, so if you get in that

position to where you are unable to afford to hire one, you ought to notify the Clerk [114] of this Court and a competent attorney will be appointed to represent you.

I would suggest that you make that determination and advise the Court so that someone can be appointed to represent you at an early date so there will not be any delay.

MR. DINITZ: I would just like the record to read that I have not waived my right to counsel at this hearing. I would like the record to read that I have not waived my right to counsel at this hearing.

THE COURT: The record will so reflect.

MR. DINITZ: Thank you, Your Honor.

THE COURT: Yes, sir.

(Whereupon, the hearing in the above-entitled matter was concluded.)



SUPREME COURT OF THE UNITED STATES

No. 74-928

UNITED STATES, PETITIONER,

*v.*

NATHAN GEORGE DINITZ

ORDER ALLOWING CERTIORARI
Filed March 31, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 375426 191

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IN THE SUPREME COURT

OF THE UNITED STATES

74-928

October Term, 1974

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United States of America,

Petitioner

v.

Nathan George Dinitz,

Respondent

---

AFFIDAVIT

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I, Nathan George Dinitz, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to respond to the government's objection to the opinion below.

5. I desire that my court appointed attorney below represent my cause in this court.

6. The nature of said cause is briefly stated as follows:

I was brought to trial having been charged with comspiracy to distribute a Schedule I controlled substance in violation of 21 U.S.C. 846 and distributing such substance in violation of 21 U.S.C. 841 (2) (1). After my chief defense counsel was ordered out of the courtroom by the trial judge, my first trial was aborted. I proceeded, pro se, in a second trial, having raised due process and double jeopardy questions, and was found guilty on both counts. I filed in forma pauperis in the Fifth Circuit Court of Appeals pursuant to the Fifth Circuit Court Rule 7, my request was granted and Professor Fletcher N. Baldwin, Jr. was appointed to prefect my appeal. The Fifth Circuit reversed my conviction finding that the trial court's action constituted double jeopardy. 492 F.2d 53 (5th Cir. 1974). After granting the government's motion for rehearing en banc, the full court, fifteen judges sitting, affirmed the panel's decision. 504 F.2d 854 (5th Cir. 1974). The Solicitor General of the United States has now petitioned the United States Court of Appeals for the Fifth Circuit for a Writ of Certiorari.

My position below which was sustained by the Fifth Circuit en banc centered around the fact that the action of the trial judge resulted in my being placed twice in jeopardy in violation of the Fifth Amendment and my being denied effective assistance of counsel in violation of the Sixth Amendment.

Nathan George Dinitz
NATHAN GEORGE DINITZ

Richard Warren
NOTARY PUBLIC

Notary Public, State of Florida at Large
My Commission Expires Aug. 22, 1978
Bonded by American Fire & Casualty Co.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-928

UNITED STATES OF AMERICA,

Petitioner

versus

NATHAN GEORGE DINITZ,

Respondent

---

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

---

Brief for the Respondent Nathan
George Dinitz in Opposition

---

FLETCHER N. BALDWIN, JR.
HOLLAND LAW CENTER
UNIVERSITY OF FLORIDA
GAINESVILLE, FLORIDA 32611
ATTORNEY FOR RESPONDENT

INDEX

| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATEMENT | 3 |
| ARGUMENT | 12 |
| CONCLUSION | 22 |
| CERTIFICATE OF SERVICE | 23 |

CITATIONS

| Cases: | Page |
|---|---|
| Brown v. United States, 356 U.S. 148 (1958) | |
| Brown v. United States, 264 F.2d 363 (D.C. Cir. 1958) | 14 |
| Davis v. State, 291 So. 2d 346 (Ala. 1974) | 20 |
| Downum v. United States, 372 U.S. 734 (1963) | 15 |
| Glasser v. United States, 315 U.S. 60 (1942) | 14 |
| Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) | 13 |
| Illinois v. Somerville, 410 U.S. 458 (1973) | 15, 16, 19, 20 21 |
| In re McConnell, 370 U.S. 230 (1962) | 20 |
| Johnson v. Zerbst, 304 U.S. 458 (1938) | 13 |

| | Page |
|---|---|
| Lillard v. Commonwealth, 267 S.W. 2d 712 (Ky. 1954) | 19 |
| McKissick v. United States, 379 F.2d 754 (5th Cir. 1967) | 14 |
| State v. Turpin, 103 Pac. 438 (Or. 1909) | 19 |
| State v. Whitman, 74 P.2d 696 (Utah 1931) | 19 |
| United States v. Aurbach, 420 F.2d 921 (5th Cir. 1969) | 13 |
| United States v. Dinitz, 492 F.2d 53 (5th Cir. 1974) | 5, 10, 13, 15, 17 |
| United States v. Jorn, 400 U.S. 470 (1971) | 13, 21 |
| United States v. Mitchell, 138 F.2d 831 (2d Cir. 1943) | 14 |
| United States v. Perez, 9 Wheat. 579, 22 U.S. 256 (1874) | 15 |
| United States v. Walden, 448 F.2d 925 (4th Cir. 1971) | 15 |
| United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953) | 19 |
| CONSTITUTIONAL PROVISIONS | |
| United States Constitution Fifth Amendment | 2 |
| Sixth Amendment | 2 |
| Statutes: | |
| 21 U.S.C. 841(2)(1) | 3 |
| 21 U.S.C. 846 | 3 |


IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

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NO.

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UNITED STATES OF AMERICA,

Petitioner

versus

NATHAN GEORGE DINITZ

---

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

---

Brief for the Respondent
Nathan George Dinitz in Opposition

---

## OPINIONS BELOW

The initial opinion of the Court of Appeals (Petitioner App. A, pp. 12-252) is reported at 492 F.2d 53 (5th Cir. 1974). The per curiam opinion of the Fifth Circuit Court of Appeals en banc (Petitioner App. 13, pp. 26a-28a) is reported at 504 F.2d 854 (5th Cir. 1974). The opinion of the District Court (Petitioner App. D, pp. 31a-37a) is unreported.

## JURISDICTION

The judgement of the Court of Appeals en banc (Petitioner App. C, PP. 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a Writ of Certiorari to and including January 26, 1975. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

Whether the court below erred in concluding that the trial judge's action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible.

Whether the court below erred in concluding that judicial error alone, rather than defendant's exercise of any option to stop or go forward, took away defendant's valued right under the Fifth Amendment to have his trial completed by a particular tribunal.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

The Sixth Amendment to the United States Constitution provides in part:

> ... In all criminal prosecutions, the accused shall enjoy the right to ...the Assistance of Counsel for his defense.



## STATEMENT

The respondent, Nathan George Dinitz, was charged with violating 21 U.S.C. 841(a) and 21 U.S.C. 846: conspiring to distribute and distributing a schedule 1 controlled substance. On the day of his arrest the defendant retained local counsel, Jeffrey Meldon, Esquire, to conduct his pre-trial defense until he could find an experienced criminal trial lawyer to conduct his defense. A week before trial, respondent retained Maurice Wagner, Esquire, an experienced trial advocate to conduct his defense. Although Mr. Wagner was not a member of the bar of the Northern District of Florida, he was admitted by the court and recognized by that court as defendant's lead counsel. (1 R. 77 & 80). The same courtesy was extended to one of the government attorneys (11 R. 56). The trial judge, the honorable David Middlebrooks, informed the jury that Mr. Wagner would represent the respondent (11 R. 12). There was no objection by the government to Mr. Wagner's presence (11 R. 44-46).

On February 15, 1973, trial began. Mr. Wagner's opening statement to the court was a motion to suppress, made outside of the presence of the jury (11 R. 30). During the hearing on the motion to suppress the court engaged in its first exchange with Mr. Wagner by informing him that he would be removed from the courtroom if he continued to present his motion in an argumentative fashion (11 R. 59). The motion to suppress was denied, and the newly selected

jury was called back into the courtroom.

At the conclusion of the government's opening statement -- which included a personal opinion and final arguments in the statements by the government attorney without any rebuke by the judge (11 R. 71) -- Mr. Wagner began his opening statement to the jury, first telling them that he represented Mr. Dinitz (11 R. 71-72). Neither the government nor the court chose to challenge his statement. He then proceeded with his opening statement until he told the jury that he would call this the "Case of the Incredible Witness" (11 R. 72), whereupon the government objected. This objection was sustained on the ground that the statement was a personalopinion and personal opinions had no place in opening statements. Wagner apologized to the jury, observing that he did not realize the statements were improper. At that point the trial judge removed the jury (11 R. 73). Outside of the presence of the jury, the judge accused Wagner of baiting the court and issued the second threat of removal of Wagner (11 R. 73).

The second time the jury was removed involved a government objection that Mr. Wagner was presenting a final argument; the jury was promptly removed and the objection immediately sustained. (11 R. 76) When the jury returned, Mr. Wagner apologized to them. (11 R. 77) The prompt action of the government and the court prevented any influence to be felt by the jury and remedied any possible impropriety.



The third and final removal of the jury occurred when Mr. Wagner said: "Some week or ten days later Nat began to get telephone calls offering--" (11 R. 87). The government objected, arguing that Wagner was moving into irrelevant material. The court immediately removed the jury and ordered Mr. Wagner to proffer his evidence to show that the statement he was about to make was not irrelevant. The court stated that unless Mr. Wagner could convince the court that the disputed evidence was both relevant and admissible, he, Mr. Wagner, would be removed permanently from the courtroom (11 R. 88-95). What was the disputed evidence in question? The Fifth Circuit panel speaking through Judge Clark summed it up when he pointed out that:

> The crux of the government's case on both counts was to be the testimony of Agent Cox as to the circumstances of his purchase from Dinitz. Wagner's trial strategy was to attack the credibility of Cox; a part of this strategy was to put before the jury at the outset the idea that Dinitz had been "set up" with the sale to Cox as a predicate for a subsequent extortion attempt. Wagner intended to offer proof that a week after his arrest Dinitz had received a phone call from someone who offered to arrange for all charges to be dropped if Dinitz would pay over a certain amount of money. Obviously, Wagner hoped the jury would infer from this evidence either that Cox was the extortionist or that he had some part in the scheme. Ample proof of the attempt at extortion was known to be available to the defense. United States v. Dinitz, 492 F.2d 53, 54-55 (5th Cir. 1974).

Unable to convince the court of the relevancy of the evidence ordered proffered, the court, still outside the presence of the jury, ordered Mr. Wagner removed by stating:

"You will leave this courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now" (11 R. 95). At no time did the court consider alternatives.

Once Chief Defense Counsel Wagner was out of the courtroom, the trial court turned its attention to Mr. Meldon, the attorney retained to handle Dinitz's pre-trial defense. Inquiry was made of Meldon as to his complicity with Wagner in trial preparation (11 R. 95-97). Meldon denied being a party to the preparation and further stated that he was unprepared to try the case. The court proceeded to threaten Meldon with removal -- no other disciplinary action was ever discussed -- unless Meldon could convince the court that he did not aid Wagner in preparing the opening statement. Meldon continued denying complicity and further stated for the record that he had not been retained to conduct the trial defense, that he was not prepared, and finally that defendant Mr. Dinitz did not want him. Although the trial judge would later agree with Mr. Meldon (1 R. 76-81), he nevertheless ordered Meldon to be ready to proceed the next morning (11 R. 100-103).

The fact that Mr. Meldon wished to be removed from the case became obvious the next morning when Mr. Meldon appeared at a hearing in chambers from which the defendant was excluded and stated that the defendant did not want him, that he was not prepared, and that he did not want to try the case



(11 R. 103). Whether intended or not, the court had caused Mr. Meldon to be placed in the awkward position of expressing divided loyalties. The court finally accepted Mr. Meldon's motion to withdraw, thereby, in effect, concurring with him as to his untenable position (11 R. 112). Thus, after Wagner was removed, it was apparent even to the court that Mr. Dinitz was without counsel to proceed in his best interest (1 R. 80).

During the in-chambers proceedings and after Mr. Meldon had stated to the court that he could not proceed, the court on its own and for the first time discussed mistrial. "I am seriously considering granting a mistrial because of the fact that the government nor defendant could get a fair trial" (11 R. 108). After suggesting the idea for a mistrial, the court recessed the hearing. When the hearing resumed, Mr. Meldon stated that he had spoken to the defendant and, after a full consideration of the situation, desired to move for a mistrial. A mistrial was declared. (11 R. 109). A mistrial was granted for the following reasons: (1) Mr. Wagner had made improper comments before the jury, and he had prepared to argue that the respondent was the victim of an extortion attempt by the principal government witness, (IR. 77, 78; IIR. 105-106)(2) Co-counsel Meldon was unwilling and unprepared to represent the defendant any further; (IR. 78; IIR. 100)(3) it appeared

from Mr. Meldon's statements that the respondent did not wish Mr. Meldon to further represent him (IR. 78, IIR. 103, 105)(4) the court felt that the respondent might possibly be prejudiced by the absence of his chief counsel; (IR. 80)(5) there was a possibility of adverse publicity concerning this case; (IIR 107)(6) the forceable removal of Mr. Wagner by the court during his proffer of evidence created a situation where it was a manifest necessity to declare a mistrial. (IR 80).

On February 23, 1973, Mr. Meldon moved to withdraw as counsel for the respondent (IR 56). A hearing was held on the motion, (IIIR 112-114) and the motion was granted on February 23, 1973. (IR 57) On February 26, 1973, the respondent moved to dismiss the indictment, on the grounds that his right to counsel, and to not be twice placed in jeopardy, precluded retrial. (IR 63-70). The respondent also moved to have his counsel, Maurice Wagner, reinstated. (IR 58-62). Both motions were denied, (IR 76-81) and on April 17, 1973, the defendant, without assistance of counsel was retried and convicted of both counts charged. (IR 148). Over general objections by defense counsel that the respondent's record was a good one [IVR 5-7], the Court fixed sentence at five years on each count to run concurrently [IVR 7-8; IR 149]. An appeal notice was timely filed by the defendant [IR 150].



Pursuant to the Fifth Circuit Court of Appeals Rule 7, Fifth Circuit Plan Under the Criminal Justice Act an attorney, Fletcher N. Baldwin, Jr., was appointed June 11, 1973 to perfect respondent's appeal. A divided panel of the Fifth Circuit Court of Appeals reversed respondent's conviction (Pet. App. A. pp. 1a-25a). After granting the government's motion for rehearing en banc, the full court affirmed the panel's decision (Pet. App. pp. 26a-28a). The position of the majority of the Appellate Court was that respondent's claim of double jeopardy revolved around two distinct factual issues: first, the threshold issue facts of whether on the unique facts of this case the respondent involuntarily waived his right not to be twice in jeopardy; and, second, if it were not respondent's motion, whether the court's declaration of the mistrial was justified by manifest necessity. With respect to the first issue, the panel held that the actions of the trial judge in banishing defendants chief trial counsel and threatening to take disciplinary action against the remaining co-counsel coupled with co-counsel's lack of preparation, court's failure to consider alternatives, and respondent's refusal to be represented by co-counsel Meldon, gave respondent no choice but to move or to accept a mistrial. "Under circumstances of this case . . . Respondent can hardly be said to have relinquished voluntarily his right to proceed before the first jury."

United States v. Dinitz, 492 F.2d 53, 59 (5th Cir. 1974).

In considering the second issue, the panel pointed out that "usually the declaration of the mistrial is extemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result the appellate court normally tests to determine whether the precipitating event created a requisite manifest necessity to abort the trial." On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Because the die was cast with the trial judge's response to the conduct of defense counsel, the panel held that appellate review must be focused on Wagner's expulsion rather than on the subsequent declaration of a mistrial. The panel then concluded that means of dealing with Wagner's conduct short of excluding him from the trial had been available to the trial judge, and that these alternatives should have been but were not considered. Thus, in the view of the majority of the panel, as affirmed, en banc, the action of the trial judge in excluding Wagner, threatening Meldon, and refusing to consider alternatives was an abuse of discretion, and the sua sponte mistrial barred renewed prosecution of respondent.

A dissenting member of the panel, and the dissenting members of the en banc opinion, assumed for the purposes of argument that the trial judge had erred in excluding



respondent's counsel, but rejected as too extreme to be workable, the majority views that the judge's declaration of a mistrial operated to bar respondent's subsequent trial. The dissenting judge, noting that after reviewing the record, his determination of the facts showed that the motion for mistrial was voluntarily made and therefore the court should have considered the judicial over-reaching standard, and not the abuse of discretion standard.

ARGUMENT

The petition presents no question warranting review by this Court. The petition makes a basic assumption that the mistrial flowed directly from the defense motion (Pet. II). The court below sitting as a panel and then en banc disposed of this factual issue by concluding that the defendant was not the cause of the mistrial, but it was the judge who created the error that resulted in the mistrial. It was the judge who failed to consider alternatives to the mistrial and it was the judge who created an atmosphere so adverse to defendant that he could not proceed with his case. Thus, the assumption that the mistrial was a direct result of a defense motion ignores the facts as presented in the record. The petitioner's position can be summed up as follows: (1) minor misconduct of defense counsel is not grounds for banishing counsel from the courtroom (Pet. 14); (2) minor misconduct of defense' counsel is not grounds for a mistrial (Pet. 12-13)(3). Therefore, minor misconduct of defense counsel is grounds for banishing counsel and declaring a mistrial. (Pet. 15). The logic of petitioner's position ignores the careful development of the unique facts of the instant case by the court below. As pointed out by that court, sitting en banc, the path to mistrial was paved by the actions of the trial judge, not by the respondent or his lead counsel. United States v. Dinitz, 504 F.2d 854 (5th Cir. 1974) (en banc).



See also McKissick v. United States, 379 F.2d 754 (5th Cir. 1967). As this court noted in Brown v. United States, 356 U.S. 148, 153 (1958), "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

The Petitioner argues that the mistrial waived defendant's Fifth Amendment right not to be placed twice in jeopardy because the mistrial was a direct result of a defense motion (Pet. II). A waiver, however, is the voluntary relinquishment of a known right. It is submitted that the act of Mr. Meldon in moving for a mistrial could hardly be considered voluntary, and since it was by that time clear that the trial could not reasonably continue, the motion did not relinquish a known right of the defendant and therefore United States v. Jorn, 400 U.S. 470 (1971) is inapplicable. As the Fifth Circuit panel noted: "Proceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal." United States v. Dinitz, 492 F.2d at 58. On this point the petitioner seems to agree. (Pet. 14).

The trial court was under a duty to clearly determine whether there had been a proper waiver of the respondent's constitutional right, Johnson v. Zerbst, 304 U.S. 458 (1938); United States v. Aurbach, 420 F.2d 921 (5th Cir. 1969); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), especially in light of the fact that the circumstances leading

to the mistrial were created by the court in its unreasonable use of removal powers. The petitioner fails to recognizes that the court had the option of reconsidering Wagner's conduct and warning, holding in contempt and/or petitioning the disciplinary committee of the state bar association to investigate his conduct. Any action that would have preserved the integrity of the guilt-determining process should have been followed before taking the drastic action of removing the lead counsel and aborting the trial. Furthermore, once it appeared to the court -- and it is clear from the record -- that there were irreconcilable differences between the respondent and Mr. Meldon, the trial court was under a duty to inquire into that conflict. Glasser v. United States, 315 U.S. 60 (1942); United States v. Mitchell, 138 F.2d 831 (2d Cir. 1943); Brown v. United States, 264 F.2d 363 (D.C. Cir. 1958). A motion for a mistrial, bottomed upon explicit threats to the attorney and his client, can hardly be considered a voluntary waiver by the defendant. See McKissick v. United States, 379 F.2d 754 (5th Cir. 1967). Indeed, the facts are clear, it was the effect of the trial court's action sua sponte, that created the point of no return for the respondent.

The mistrial resulted when the trial judge refused to consider alternative methods of control over an attorney he considered errant. The trial judge did not consider the damage to the respondent or the criminal justice system that



the forceable removal of his retained chief counsel created.

In the instant case, the respondent has stated, under oath, that he never consented to a mistrial (1 R. 63-65). The record clearly shows that Mr. Meldon was no longer involved in representing the respondent's best interests (1 R. 78-80; 11 R. 103, 100, 103, 104, 105). The court was well aware of Mr. Meldon's position (1 R. 80; 11 R. 103-104), and the record is otherwise silent as to any direct inquiry of the respondent by the court in order to determine his wishes with regard to a mistrial.

From the facts the court below correctly concluded that the mistrial was not of respondent's doing, see also United States v. Walden, 448 F.2d 925 (4th Cir. 1971), and indeed was the proximate and foreseeable result of the actions of the trial judge with regard to his treatment of Mr. Wagner and Mr. Meldon. Thus the only other possibility opened to the court would have been to consider, as suggested by the petitioner, whether a manifest necessity existed.

The doctrine of manifest necessity states that where a jury cannot reach a free and fair verdict, the trial ought to be stopped. See, e.g., United States v. Perez, 9 Wheat. 579, 580, 22 U.S. 256 (1824); Downum v. United States, 372 U.S. 734 (1963) and Illinois v. Somerville, 410 U.S. 458 (1973). The majority of the panel in United States v. Dinitz, 492 F.2d 53, 57-61 (5th Cir. 1974), has set forth an exceptionally well reasoned analysis of the impact of the double jeopardy

provisions and manifest necessity upon the complex and unique facts of the instant case, concluding that a manifest necessity did not exist: "This record contains no intimation that the trial judge thought the jury had been prejudiced by Wagner's mistakes of conduct up to the time they were excused upon the government's objection to the phone call statement." Id. at 60. That analysis was adopted by the majority of the Fifth Circuit sitting en banc.

If this court were to grant certiorari in the instant case the question of manifest necessity would require that this court focus on the trial and the factual circumstances surrounding the forceable removal of Mr. Wagner. That has been done by two appeals panels. Both concluding that from the facts a manifest necessity did not exist. As the petitioner notes, however, it is clear that a trial court has the discretion, within constitutional limits, to declare a mistrial on its own motion, and thus subject a defendant to re-prosecution. Illinois v. Somerville, supra. Furthermore, in the instant case, the trial court by relying on the "manifest necessity" doctrine in support of its declaration of a mistrial (I.R. 80), admits the possibility that the declaration was sua sponte and not the result of Mr. Meldon's motion (1 R. 77, 11 R. 109-110). If, from the record, the motion for a mistrial was sua sponte, the trial court went far beyond the scope of its discretion. Suppose



the trial judge had, on his own motion, dismissed the jury instead of defense counsel? And suppose further that the dismissal of the jury resulted from alleged "baiting" of the judge by a juror. Before suggesting a mistrial, it is undoubtedly true that a necessity would have to exist at the time the jury was dismissed. Could they reach a verdict? Were there other avenues open to the judge to discipline an unruly juror? If the judge had over-reacted, and if the record demonstrated that the original jury could have reached a fair verdict, then the dismissal resulted in double jeopardy, barring subsequent prosecution.

The government in the hypothetical might argue that the alternatives open to the defendant took the case out of the double jeopardy class. That is, the defendant could have concurred in the mistrial or waived his right to a jury trial. But those are not alternatives at all. The court had already acted to the detriment of the defendant and cannot expect the defendant to retroactively relieve the court of the consequences of its act.

At the time of the removal of Mr. Wagner and the explicit threats to Mr. Meldon, there was not even the hint of a manifest necessity to abort the trial. The jury had in no way been influenced by the exchange between the court and Mr. Wagner since, if for no other reason, the jury was out of the courtroom most of the time. United States v. Dinitz, 492 F.2d at 60. The alleged

misconduct of Wagner precipitating the mistrial was his anticipated statement concerning an extortion attempt made against the respondent. The other improper act attributed to Mr. Wagner was his interjection of his opinion before the jury concerning the credibility of a government witness. It should be reemphasized that just prior to that comment the United States attorney had interjected his own opinion as to the guilt of the defendant (11 R. 71). Mr. Wagner's comment resulted in a strong rebuke by the court (11 R. 72-73), yet the prior personal observation to the jury by the government passed without comment by the trial judge.

In the government's Petition the question is suggested, what should the trial judge have done to avoid the double jeopardy, once Mr. Wagner had been banished and Mr. Meldon intimidated? It is respectfully suggested that the experienced trial judge should not have reached those crossroads. Once there, the trial judge could still have reinstated Mr. Wagner to conduct the defense or allowed the defendant to pursue his appeal to the circuit court at that time (1 R. 87, 111).

The government suggests in footnote six of its petition (Pet. 13) that as a practical matter the relinquishment of the first enpaneled jury created very little harm. The double jeopardy provision, however, guarantees the right



of a defendant to complete his trial before a particular jury and without the ordeals of time, expense and emotional impact balanced against society's interest in the fair administration of justice. Illinois v. Somerville, supra. The Fifth Amendment will not permit jury shopping. Furthermore, no societal interest can be served by granting trial judges the unbridled power to summarily remove attorneys from cases for proffering evidence, even if that evidence is ruled inadmissible.

> It has been repeatedly held that, whether the discharge of a jury arose from the arbitrary act of the court, or from some mere whim or caprice of judge or jury, or from some accident or blunder, it was immaterial; in either case the result would be the same -- the discharge of the defendant. State v. Turpin, 54 Or. 367, 103 Pac. 438 (1909).

There are a few cases where a mistrial has been declared because of the alleged misconduct of defense counsel. In those cases, the reprosecution of the defendant has consistently been barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution and thus are not inconsistent with the ruling below in the instant case. See United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953); State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937); Lillard v. Commonwealth, 267 S.W. 2d 712 (ky. 1954).

In every case where a mistrial has been declared without the consent of the defendant, and reprosecution permitted, the mistrial was declared because the jury could no longer

reach a fair verdict. Where reprosecution has been barred, it has been so because the first jury was dismissed while it was still capable of reaching a fair verdict. In the instant case, it is respectfully urged that the comments of Mr. Wagner, which the jury never heard, could in no way have prevented that jury from reaching a fair verdict; therefore, reprosecution of the respondent in the instant case placed him in jeopardy. Thus Petitioner's reliance upon Illinois v. Somerville, is misplaced and had the court below held otherwise it would have in effect permitted the trial court to do in two steps what it could not constitutionally do in one. It would in fact have sanctioned the trial court's act of subjecting the respondent to multiple re-prosecutions, until such time as the defendant either was represented by counsel approved by the trial judge; or until the respondent retained counsel who would neither make any objectionable comment before the jury, nor proffer inadmissible evidence. As the court below suggested, that cannot be. See also, In re McConnell, 370 U.S. 230 (1962); Davis v. State, 291 So. 2d 346 (Ala. 1974). In the instant case there is not even a suggestion by the trial court that the original jury would have been unable to reach a just verdict, that a juror was biased, nor that there was an emergency that might necessitate aborting the trial. There is no evidence that the mistrial was necessitated by the defendant's abuse of the judicial system, nor that it was declared in the sole interest of the



respondent, nor that there was any compelling state policy to be implemented by the declaration of a mistrial. Rather, the mistrial was declared because of alleged misconduct by the retained chief defense counsel, and his resultant expulsion from the case leaving the defendant with a Hobson's choice of affirming the court's unconstitutional act or proceeding without counsel of his choosing. The choice was no choice at all. Thus, as held by the court below, the action of the trial judge rendered respondent unable to conduct his defense and therefore the second trial placed him twice in jeopardy in violation of the Sixth Amendment. Thus it is clear that there is no inconsistency in the holding of the court below and decisions of this court, especially United States v. Jorn supra and Illinois v. Somerville supra. The petitioner has failed to construct a proper foundation upon which to build a case that would be supported by Jorn and Summerville.

## CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition has been furnished by United States mail to Robert H. Bork, Esquire, Solicitor General of the United States Office of the Solicitor General, Washington, D.C. 20530, this 20th of February, 1975.

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